HUO HENG OIL CO. (E.M.) SDN. BHD. v. TANG TIEW YONG

[A.C.J. (Chong Siew Fai J.) April 30, 1984]

[Sibu – Civil Appeal No. 3 of 1983]

Practice and Procedure – Summary judgment – Application for – Mere denial – No triable issues showed – Defence filed – Subordinate Courts Rules 1980, O.26A.

Practice and Procedure – Appeal record received late – Effect of.

In its Statement of Claim dated September 29, 1982 the appellant claimed the sum of $18,510.87 being the price of diesel and oil products ordered by and delivered to the respondent's vessels. By his defence and counterclaim dated November 22, 1982, the respondent denied owing the said sum or at all and further alleged that he had been wrongfully charged with what he termed as "charter fees" to the extent of $18,569.89 which he counterclaimed as money had and received to his use. Application for summary judgment was taken out by the appellant on February 2, 1983. It was dismissed. Against the dismissal the appellant appealed.

Held: (1) the present appeal was not vitiated by the late service of the appeal record;

(2) delivery of a defence does not, in a proper case, preclude a plaintiff from applying for summary judgment;

(3) in an action for price of goods sold and delivered it is not sufficient for the defendant to merely deny the debt; he must plead any facts which negative the existence of the debt or which show that the claim is not maintainable on other grounds;

(4) the respondent had failed to establish that there was an issue to be tried or that for some other reason there ought to be a trial. The appeal is therefore allowed to the following extent: (a) there would be judgment for the appellant against the respondent for the sum of $17,601.46; (b) the residue of the amount claimed in the Statement of Claim *i.e.* the sum of $909.41 from the 24 items aforesaid would be tried, and the respondent was at liberty to defend the action in respect thereof.

Cases referred to:

(1) *Liew Chee Tat* v. *Lok Moon & Ors.* [1972] 2 M.L.J. 29.
(2) *McLardy* v. *Slateum* (1890) 24 Q.B.D. 504.
(3) *Comptroller-General of Inland Revenue, Malaysia* v. *Weng Lok Mining Co. Ltd.* [1969] 2 M.L.J. 98.
(4) *Wing* v. *Thurlow* (1893) 10 T.L.R. 151.
(5) *European Asian Bank AG* v. *Punjab & Sind Bank (No. 2)* [1983] 2 All E.R. 508 C.A.
(6) *Lloyds Bank plc* v. *Ellis-Fewster* [1983] 2 All E.R. 424, 426.
(7) *Chong Chow Fong* v. *Ban Tuck (M) Sdn. Bhd.* [1983] 2 C.L.J. 25, 26.
(8) *Hookham* v. *Mayle* (1906) 22 T.L.R. 241.
(9) *Wallingford* v. *Mutual Society* (1880) 5 App. Cas. 685 H.L.
(10) *Harris* v. *Gamble* (1878) 7 Ch.D. 877.
(11) *Morgan & Son Ltd.* v. *S. Martin Johnson & Co.* [1949] 1 K.B. 107.
(12) *Zoedone Co.* v. *Barrett* (1882) 26 Sol. Jo. 657.
(13) *Rotherham* v. *Priest* (1879) 49 L.J.Q.B. 104.
(14) *Sheppards & Co.* v. *Wilkinson & Jarvis* (1889) 6 T.L.R. 13.
(15) *Lee Guat Eng* v. *Seet Tiam Hock* [1974] 1 M.L.J. 178.

CIVIL APPEAL.

Dr. Chew Peng Hui for the appellant.

Ting Sing Chuang for the respondent.

Cur. Adv. Vult.

Chong Siew Fai J. : This is an appeal against the order of the learned trial President of the Sessions Court dismissing the application of the appellant for summary judgment under 0.26A of the Subordinate Courts Rules 1980.

In its Statement of Claim dated September 29, 1982, the appellant claimed the sum of $18,510.87 being the price of diesel and oil products ordered by and delivered to the respondent's vessels. By his Defence and Counterclaim dated November 22, 1982 the respondent denied owing the said sum or at all and further alleged that he had been wrongfully charged with what he termed as "charter fees" to the extent of $18,569.89 which he counterclaimed as money had and received to his use.

Application for summary judgment was taken out by the appellant on February 2, 1983. It was heard and dismissed on February 18, 1983. Against the dismissal the appellant appeals.

At the hearing of this appeal a point of procedure was raised by the respondent in that he received the appeal record after the expiration of the 14 days provided in the Rules of the High Court, 0.55 r.2(2) and that no application for extension of time to serve the appeal record was made. He contended that the appeal should be dismissed. In support of the argument the case of *Liew Chee Tat* v. *Lok Moon & Others*[1] was cited. But in that case it was the notice of appeal that was served late and not the appeal record. To my mind the distinction is not immaterial because under the Subordinate Courts Rules 1980 (SCR) 0.49 r.2(1), appeals to the High Court are to be brought by giving notice of appeal whereas the appeal record contains such matters as are specified in 0.49 r.3(1) of S.C.R.

It is also not insignificant to note that there is a difference in the practice between appeal from a decision of the High Court to the Federal Court

and appeal from a decision of the Subordinate Court to the High Court. In the former case the memorandum of appeal is attached to the appeal record which is prepared by the appellant or his counsel whereas in the latter case the memorandum of appeal is prepared after receiving the appeal record prepared by the court registry and is, in practice, filed and served as such (*i.e.* memorandum of appeal). Hence in an appeal from the Subordinate Court, if a copy of the memorandum of appeal (called "Petition of Appeal" in our instant case) has been served as in the instant appeal, non-service or late service of the appeal record does not preclude the respondent from or cause delay to his knowing the grounds of appeal stated in the memorandum of appeal which is served separately. The same, however, may not be said in the case of an appeal from the High Court to the Federal Court since the memorandum of appeal is attached to the appeal record and usually forms part thereof. There is also no suggestion that the respondent was in any way prejudiced by the late service of the appeal record. In fact, it appears correct as submitted by counsel for the appellant that prior to the service of the appeal record, the respondent already had all the documents therein included except, perhaps, the grounds of judgment. Whilst not in any way suggesting that due compliance of the provisions of the rules may be lightly disregarded, I am, in the circumstance, inclined to hold that the appeal is not vitiated by the late service of the appeal record.

In dismissing the application the learned trial President said:

"It appears that the application was made under 0.26A but that Order or Rule applies only where the defendant has entered an appearance, not where as here the defendant has delivered or served his defence and the pleadings were deemed to be closed. It seems to me that the plaintiff is rather late in the day to apply or invoke or use the process. ....."

With respect, unlike in the High Court, the requirement of entering appearance by a defendant in an action in the subordinate court before making an application for summary judgment has, at the material time, been done away *vide* P.U. (A) 127/81. Furthermore, the statement that Order 26A does not apply where "the defendant has delivered or served his defence and the pleadings were deemed to be closed" seems too rigid. There is no express provision in the rule restricting time within which an application for summary judgment must be made except that it can only be made after a statement of claim has been served on the defendant and that the action must be one to which 0.26A r.1 applies.

Delivery of a defence does not, in a proper case, preclude a plaintiff from applying for summary judgment. In *McLardy* v. *Slateum*[2] Pollock B., in allowing an application made after one month of the defence being filed, said (page 506):

"The view taken by other judges, and by the masters, is that the intention of Order XIV, r.1, was that the plaintiff should apply within a reasonable time after the appearance of the defendant, but that it very often happens that a defence, which has been delivered, itself discloses facts which make an application under Order XIV right and proper. We think that this is the proper construction of the rule.

Although the primary intention of the rule may be that an application should be made before a defence has been delivered in the ordinary course, yet we think that it is not in all cases compulsory. Therefore our judgment upon this point of law and practice is that a plaintiff is not necessarily too late in making his application under Order XIV, r.1, because a defence has been delivered."

In *Comptroller-General of Inland Revenue, Malaysia* v. *Weng Lok Mining Co. Ltd.*[3] application for summary judgment was not made till some 3 months after the defence was filed, In an application by the defendant to dismiss the summons for summary judgment on the ground of undue delay in taking out the summons. Raja Azlan Shah J. (as he then was) (now DYMM Sultan of Perak) accepted the reasons (irrelevant for our purpose) for the delay advanced by counsel for the plaintiff and held that the delay of a lapse of 3 months in the circumstance of the case was not inordinate and did not warrant a dismissal of the application.

Thus the mere fact that a defence has been filed and delivered and that pleadings are deemed to be closed do not by themselves preclude a plaintiff from seeking recourse to 0.26A for summary judgment in a proper case on the ground that he is too late in making the application.

The note of proceedings does not contain or show any argument of counsel at the hearing of the application. In the circumstance, this court will proceed on the basis that the remark of the learned trial President about the appellant's lateness in making the application was made without the advantage of knowing the reasons for the late application. The time-lapse between the date of the defence and the date of filing this application is about 2 1/3 months. At the hearing of this appeal, counsel for the appellant stated that the reasons

for the delay in making the application were that the managing director of the appellant-company was away travelling and that accounts were involved and needed time to prepare. In the light of what was stated, I am of the view that the delay is not inordinate and does not defeat the application. As in *Comptroller-General of Inland Revenue, Malaysia* v. *Weng Lok Mining Co. Ltd.*, the course I take is, in my opinion, justified by the conclusion I shall reach when dealing with the defence.

Before dealing with this appeal further, it is necessary to consider *Wing* v. *Thurlow*[4] which was often cited in support of the contention that where unconditional leave to defend is granted, the appellate court should not interfere unless special circumstances are shown. *Wing* v. *Thurlow*, *supra*, decided that where the Divisional Court in England had given unconditional leave to defend, the Court of Appeal would not interfere unless special circumstances are shown. That case was not followed in *European Asian Bank AG* v. *Punjab & Sind Bank (No. 2)*[5] in which it was considered not right to regard the above statement in *Wing* v. *Thurlow* as applicable to the jurisdiction which could now be exercised. The above view in *European Asian Bank* appears to have connection with the historical background. In England from 1894 to the passing of the Supreme Court Act 1981 there could be no appeal against an order giving unconditional leave to defend. Since then an appeal against such order lies with leave of the judge or the Court of Appeal. In contrast to the situation in England, in our country, appeal lies to the higher tribunal against such an order even before 1981. In *European Asian Bank*, Robert Goff L.J. considered the circumstances in which the court should give summary judgment for a plaintiff by referring to the English Rules of the Supreme Court 0.14 r.3(1) which is the same as our Subordinate Courts Rules 1980 0.26A r.3(1), and noted that the appeal is by way of a rehearing which is also similar in our country respecting appeals from Subordinate Courts to the High Court. (Section 29 of the Courts of Judicature Act 1964). I am therefore inclined to the view that in our country in an appeal against an order granting unconditional leave to defend, the requirement (as in *Wing* v. *Thurlow*) of the existence of very special circumstances would not apply.

Though it is alleged in the Statement of Claim that the claim of $18,510.87 was for diesel and oil products ordered and delivered, it is obvious, from the Reply and Defence to Counterclaim dated December 3, 1982 and from the affidavit evidence, that the above sum claimed was partly made up of "chartered fees." In the course of the hearing, I directed that the claim on "chartered fees" to be separated from the price of diesel and oil products delivered; this was done and both parties agreed that the claim under "chartered fees" was $909.41 from 24 items. (See Messrs. Battenberg & Talma's letter dated August 23, 1983 and Messrs. Yong & Wong's letter dated August 25, 1983 marked Exhibits "X" and "Y" respectively). They are in fact represented by bills which are prefixed by the letter "F" to their numbers as contained in paragraph 2 of the Statement of Claim. This means that the price for the diesel and oil products claimed is $17,601.46 ($18,510.87 less $909.41). So far as the said sum of $909.41 is concerned, there can be no doubt that the respondent has shown cause entitling him to unconditional leave to defend. It is the balance ($17,601.46) of the claim that requires closer examination. Under 0.26A r.3(1), if the case so justifies, judgment for an applicant may be given on part of his claim.

In an appeal of this nature where the triability of an issue depends on evidence and fact as opposed to an issue of law, the appellate court will not normally disturb the view of the lower court. But it is different if it is a matter of law. *Lloyds Bank plc* v. *Ellis-Fewster.*[6]

In our instant case, no reasons were given for holding that there were triable issues. Nor were arguments, if any, of counsel recorded from which some indication of the ground or grounds for the decision may be obtained. Respecting the claim of the appellant for the price of the goods sold and delivered, counsel for the respondent admitted that the respondent relied on paragraph 2 of the Defence and Counterclaim. Having regard to the pleadings, this is plainly the case. It is therefore necessary to consider the said paragraph 2 which reads:

> "With regards paragraphs 2 and 3 of the Statement of Claim, the Defendant denies owing the Plaintiff the said sum of M$18,510.87 or at all and shall put the Plaintiff to strict proof thereof."

With respect, the above general denial is, in my view, bad in law. In an action for price of goods sold and delivered, it is not sufficient for the defendant to merely deny the debt; he must plead any facts which negative the existence of the debt or which show that the claim is not maintainable on other grounds *e.g.* the contract or order, the delivery, or the amount claimed. (See *The Supreme Court Practice 1982* Vol. 1 para. 18/13/5. *Bullen & Leake* on Precedents of Pleadings 12th Edition page 1278). See also *Chong Chow Fong* v. *Ban*

Tuck (M) Sdn. Bhd.[7] at page 26 where Edgar Joseph Jr. J. said:

"The record provided shows that the defence filed merely denied that the sum claimed or any part thereof was owing by the appellant to the Respondent who was put to strict proof. Such a defence is bad in law because in an action for goods sold and delivered the defendant must not merely plead a denial of the debt but must plead any facts which negative its existence or show that the action is unsustainable on other grounds, for example, the order or contract, the delivery or the amount claimed. Indeed, if a defendant by his Statement of Defence simply "puts the plaintiff to proof of the several allegations in their statement of claim" the defendant will be taken as admitting the claims alleged in the Statement of Claim and the plaintiff would be entitled to judgment without adducing any evidence in support of his case: (see *Harris* v. *Gamble* (1878) VII Ch.D. p. 877)."

In opposing the application for summary judgment, the respondent must satisfy the court that with respect to the applicant's claim there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim (0.26A r.3(1)). But this cannot be achieved by raising facts which do not constitute a defence to the claim: *Hookham* v. *Mayle*[8] nor by a mere general denial of indebtedness: *Wallingford* v. *Mutual Society*[9], where Lord Blackburn said (page 704):

"I think that when the affidavits are brought forward to raise that defence they must, if I may use the expression, condescend upon particulars. It is not enough to swear, "I say I owe the man nothing." Doubtless, if it was true, that you owed the man nothing, as you swear, that would be a good defence. But that is not enough. You must satisfy the Judge that there is reasonable ground for saying so."

Likewise, the expression "the defendant puts the plaintiff to proof" is insufficient traverse. (See *Harris* v. *Gamble*[10]).

The fact that in paragraph 2 of the defence the respondent denies the amount claimed does not entitle him to unconditional leave to defend. In this respect it is necessary to consider the affidavit evidence. Paragraph 3 of Wee Ee Siong's affidavit made on January 20, 1983 stated that the claim $18,510.87 was made up of the price of diesel and oil products and freight or transport charges for the months of May, June and July 1982, and that the account for the supplies to the vessels Yong Hing No. 1 and Yong Hing No. 5 had been settled up to the end of April 1982 and March 1982 respectively. (See paragraph 5 of Wee Ee Siong's said affidavit). To the contention of settlement there is no denial from the respondent. What is the respondent's answer to the appellant's claim? It is necessary to examine his affidavit in opposition made on February 12, 1983. In paragraph 3 therefore, he said:

"With regards paragraphs 3 and 4 of the said affidavit of Wee Ee Siong, I am advised and I verily believe that the alleged claim of $18,510.87 by the plaintiff against me in this action could not be lawfully maintained because as shown clearly by the two types of bills annexed in the said affidavit of Wee Ee Siong and marked 'A' therein, there were in fact two transportation charges for each occasion of supply of diesel and oil product made to me by the plaintiff, namely 'delivery charges' and 'charter fee' and out of these two transport charges, I had never agreed to the plaintiff to debit the said account with an item alleged by the plaintiff to be charter fee so that it is clear that the plaintiff had been overcharging me with an item called 'charter fee' ever since 1980."

A study of the above quoted paragraph 3 reveals that there is in fact no denial of the claim for the price of the diesel and oil products ordered and delivered. The complaint of the respondent, however, is that he had been overcharged with "delivery charges" and "charter fee." But a comparison of the 24 items aforesaid amounting to $909.41 against the particulars of account marked "A" annexed to the defence and counterclaim will show that all these 24 items are also subject-matter of the counterclaim. So far as concerning these 24 items, I agree, as I have said earlier, that they must go to trial. As to all the other paragraphs of the respondent's affidavit in opposition, apart from paragraph 2 in which he contended that he never agreed to the payment of the "charter fee" (which has been agreed by counsel to be in the sum of $909.41), the remaining paragraphs of the respondent's said affidavit were about his counterclaim on "chartered fee" for $18,569.89. Apart from touching on the 24 items aforesaid and dated May and June 1982 (see the list marked "A" annexed to the respondent's defence and counterclaim), the said remaining paragraphs of the affidavit deal with the remaining items in the said list "A" which are in respect of transactions prior to May 1982 and are unconnected and irrelevant to the appellant's claim for the price of the goods ordered and delivered in this action.

Counsel for the respondent cited paragraph 14/3-4/12A in Volume I of the *Supreme Court Practice 1982* (English) in support of his contention that unconditional leave to defend should be given. So far as is relevant to the instant case, the said passage is to the effect that unconditional leave to defend should be given where the *bona fide* counterclaim set up arises out of the same subject-matter of the action and connected with the grounds of defence. As shown in the case of *Morgan & Son Ltd.* v. *Martin Johnson & Co.*[11]

cited therein, the defendants' claim of set-off was in relation to one of the vehicles respecting which the plaintiffs claimed for storage and was closely interwoven with it. Similarly, unconditional leave to defend should be given where the defendant has no defence to the plaintiff's claim but raises a *bona fide* counterclaim which is in the nature of a defence to the claim. *Zoedone Co.* v. *Barrett.*[12] But where on the pleadings and affidavit evidence there is clearly no defence to the plaintiff's claim and the counterclaim raised has no connection with the plaintiff's claim, the plaintiff is entitled to judgment: *Rotherham* v. *Priest*[13]; *Sheppards & Co.* v. *Wilkinson & Jarvis.*[14] As already indicated, with the exception of the 24 items dated May and June 1982 contained in the list marked "A" annexed to the respondents' defence and counterclaim, the remaining items therein are unconnected with that part of the appellant's claim of $17,601.46 being the price of goods ordered and delivered.

Insofar the appellant's claim of $17,601.46 being the price for the diesel and oil products ordered and delivered, the respondent has failed to establish that there is an issue to be tried or that for some other reason there ought to be a trial. Accordingly, I allow the appeal to the extent set out below. The order of the lower court is rescinded. There shall be judgment for the appellant against the respondent for the sum of $17,601.46 with interest at 8% per annum from to-day until payment. In the circumstances of the case including the fact that there is a counterclaim which exceeds the claim of the appellant, I would exercise my discretion and order that execution on the said judgment be stayed until trial of the respondent's counterclaim or until further order. (*Lee Guat Eng* v. *Seet Tiam Hock*[15]).

The residue of the amount claimed in the Statement of Claim *i.e.* the sum of $909.41 from the 24 items aforesaid shall be tried, and the respondent is at liberty to defend the action in respect thereof.

As to costs, since the appellant has substantially though not wholly, succeeded in this appeal and should have likewise substantially succeeded in its application in the lower court, there shall be an order that 2/3 of the costs of this appeal and 2/3 of the costs of the application to the lower court be the appellant's in any event.

Order accordingly.

Solicitors: *Battenberg & Talma; Yong & Wong.*

HO AH KIM & ORS. v. PAYA TRUBONG ESTATE SDN. BHD.

[O.C.J. (Mohamed Dzaiddin J.) February 22, 1984, August 20, October 9 & December 20, 1985]

[Penang – Civil Suit No. 251 of 1980]

Contract – Sale and purchase of land – Specific performance – Defence of limitation – Compensation for breach of contract by defendants in substitution for specific performance – Refund of deposit paid by purchaser – Specific Relief Act 1950, ss. 11 & 18 – Limitation Act 1953, s.9(1).

The plaintiffs are the executors of the estate of Liew Yeong Choy, deceased, who entered into an agreement in writing dated February 19, 1972, with the managing director of the defendant company whereby the deceased agreed to buy and the defendant company agreed to sell a portion of its land to the extent of about 15 acres. Upon the execution of the agreement, the deceased paid the sum of $18,000.00. Clause 1 spells out the terms of the agreement for sale. Clause 2 states that the defendants shall from time to time keep the deceased informed about the Penang Government's option. Correspondence passed between the defendants and the deceased. The defendants indicated to the deceased that he could buy the land at $7,000.00 per acre, not at the old price of $4,000.00. Eventually on January 20, 1980, the defendants' solicitors wrote to the plaintiffs' solicitors refunding the sum of $18,000.00 which purported to discharge the defendants from the said agreement, thus giving rise to the present proceedings by the plaintiffs for specific performance or damages for breach of contract.

Held: (1) in an action for specific performance of an agreement for sale of land, section 9(1) of the Limitation Act 1953, applies. In the present case, the alleged breach occurred on January 20, 1980. Therefore time began to run from that date. Even if the right of action accrued from the expiry of the "option" on July 10, 1973, the plaintiffs were still within the 12-year period from May 24, 1980, when the plaintiffs filed their statement of claim;

(2) the agreement for sale is not void *ab initio* for uncertainty but enforceable at law;

(3) on the defence of laches and acquiescence as pleaded in para. 10 of the defence there is clear evidence from the correspondence and the defendant DW1 that the parties were at all times negotiating for specific performance of the said agreement. In fact, the defendants through their solicitors impliedly gave the deceased a false hope of furnishing a detailed agreement to be executed between the parties. This was followed by the negotiations about the price. The court is therefore satisfied that the defence of laches and acquiescence cannot succeed;

(4) the court did not grant specific performance but awarded compensation for breach of the agreement. In the circumstances it is fair and reasonable to assess compensation on the basis of $4,000.00 per acre being the purchase price originally agreed between the parties..The defendants were ordered to pay the plaintiffs the sum of $60,000.00 as compensation. They must also refund the sum of $18,000.00 paid as deposit. Costs of the action to the plaintiffs.